University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, Except July, August and September, by the University of Pennsylvania Law School, at 236 Chestnut Street, Philadelphia, Pa., and 34th and Chestnut Streets, Philadelphia, Pa.

SUBSCRIPTION PRICE, $2.50 PER ANNUM; SINGLE COPIES, 35 CENTS

NOTES.

BANKRUPTCY—SALE OF PROPERTY BY TRUSTEE—DOWER INTEREST OF WIFE—The United States District Courts have reached directly opposite results in applying the Bankruptcy Law of 1898, as amended in 1910, to the law of Pennsylvania. The question involved is whether or not, under the act, the purchaser of the bankrupt's property, sold by the trustee under order of court, takes such property free and clear of the inchoate right of dower of the bankrupt's wife. The court for the middle district held just a year ago that such a sale divested the bankrupt's real estate of the wife's dower right.[1] The court for the western district now holds directly *contra*.[2] As is so often the case, the split here is due to a strict interpretation of the words of the Bankruptcy Act on the one hand, and on the other, to a broader interpretation of the act read in the light of the existing law of Pennsylvania.

At common law the wife's right of dower was not considered a part of the estate of her husband and was not affected by pro-

[1] *In re* Cordori, 207 Fed. Rep. 784 (1913).

ceedings in bankruptcy against him.[3] Likewise in Pennsylvania, dower is an estate of the wife and not merely a lien which she has on her husband's estate.[4] However, to this rule there are two exceptions, and it is because of these exceptions that the difference of opinion in the principal cases has arisen. In 1705 an act was passed providing certain methods for taking lands in execution for payment of debts.[5] Though no mention was made of dower, the courts curiously enough interpreted this act and other acts on the subject as permitting the taking of the wife's dower right to sell on execution upon a judgment recovered against her husband, or upon a *scire facias* on a mortgage executed by him alone.[6] Thus the right of dower in Pennsylvania is similar to that right at common law except in so far as the law of Pennsylvania has made the wife's dower a chattel for the payment of the husband's debts. But the courts have refused to extend this abridgment of the common law rule.[7] Mr. Justice Gray in the Supreme Court of the United States said that "the state court has constantly held [8] that, with these exceptions [*i. e.*, those noted, *supra*], the right of dower is as much favored in Pennsylvania as elsewhere, and that the old decisions are not to be extended and that neither an absolute conveyance by the husband nor an assignment by him for benefit of creditors . . . impairs the wife's right of dower."[9]

Relying on the decision of last year [10] it was contended in *re Chotiner* [11] that the trustee under the Bankruptcy Act is, in Pennsylvania, in the same position as a judgment creditor and, therefore, has power to divest the bankrupt's wife of her dower right in the property sold, *i. e.*, that the trustee now comes under the exceptions noted above. The Amendment of June 25, 1910, to Section 47a (2) provides that the trustee "shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon." [12] Such a creditor under the Pennsylvania exception may divest the wife of her dower rights and the wording of the act would seem to put the trustee into the shoes of a judgment

[2] *In re* Chotiner, 216 Fed. Rep. 916 (Sept. 17, 1914).

[3] Squire v. Compton, Vin. Ab. Dower, G. pl. 60; Smith v. Smith, 5 Ves. 189 (1800).

[4] Bachman v. Chrisman, 23 Pa. 162 (1854); Diefenderfer v. Eshleman, 113 Pa. 305 (1886).

[5] 1 Sm. L. 57.

[6] Graff v. Smith, 1 Dall. 481 (Pa. 1789).

[7] But greatly extended by statute today in England. See Dower Act, 1833, 3 & 4 Wm. 4.

[8] Kennedy v. Nedrow, 1 Dall. 415 (Pa. 1789); Helfrich v. Obcomyer, 15 Pa. 113 (1850).

[9] Porter v. Lazear, 109 U. S. 84 at p. 88 (1883).

[10] *Supra*, n. 1.

[11] *Supra*, n. 2.

[12] U. S. Comp. St. Supp. (1911), p. 1500.

creditor. Section 70a (5) is also in point.[13] However, it was part of the original Act of 1898 and has been held not to include in the bankrupt's salable property the dower interest of his wife.[14] But the meaning of Section 47, *supra,* is yet to be interpreted by a higher court.

A consideration of the purpose of the Amendment of 1910 may throw some light on the subject. It would seem that it was passed to remedy a defect in the original act arising over the question of what title the trustee acquired to personal property of the bankrupt, which had been the subject of a conditional sale.[15] In the case cited it was held that, since the trustee was vested with no better title than the bankrupt himself had, the conditional vendor might retake the property for failure of bankrupt to pay for it. Yet the law of the State of Ohio made the conditional sale void as against creditors of the bankrupt. Thus the creditors could have levied on this property previous to bankruptcy, yet subsequently the trustee for benefit of creditors could not. Many cases have since arisen on this question,[16] and it is generally admitted that it was for this purpose that the Amendment of 1910 was passed.[17] On the other hand the Supreme Court of Pennsylvania has flatly said that the amendment has given the trustee "the power to assert every right which such [judgment] creditors could have asserted during the period of four months immediately preceding the filing of the petition in bankruptcy."[18] There is no doubt of the meaning of this. It lays down a broad principle and appears to bring the trustee within that exceptional class which, in Pennsylvania, is allowed to divest the bankrupt's wife of dower right. In spite of this, however, the District Court for the Western District of Pennsylvania maintains that the Bankruptcy Act vests in the trustee "no other estate than the bankrupt's"[19] and insists that the wife holds a separate estate and not a mere chose in action against her husband's estate.[20]

The Bankruptcy Law, as a federal statute, should be enforced throughout the States with as much uniformity as possible. Some fifteen States, including Massachusetts, New Jersey and New York, protect dower even from execution by a judgment creditor or a mortgagee where the wife did not join in making the mortgage.[21]

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[13] The section referred to reads "The trustee of the estate of a bankrupt . . . shall . . . be vested with the title of the bankrupt . . . to all . . . property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

[14] *In re* Hays, 181 Fed. Rep. 674 (1910).

[15] York Mfg. Co. v. Cassell, 201 U. S. 344 (1906).

[16] Holt v. Henley, 232 U. S. 637 (1914).

[17] Collier on Bankruptcy (10th. ed.), §§47, 659.

[18] Bank of N. A. v. Penn Motor Car Co., 235 Pa. 194 (1912).

[19] *Supra,* n. 2.

[20] *Supra,* n. 4.

[21] Ala., Ill., Iowa, Md., Mass., Mich., Miss., Mo., N. J., N. Y., N. C., Ohio,

Thus the 1910 Amendment will have no bearing on this point in these States and the trustee will continue unable to divest the bankrupt's wife of her dower right. To line up Pennsylvania with these States and thereby make uniform the application of the Bankruptcy Act, *in re Chotiner* must be upheld by the Supreme Court of the United States. Clearly the General intent of the Amendments of 1910, as seen by the debates of Congress [22] and their interpretation by the courts,[23] was to deal with the question of conditional sale, *supra*. There is nothing tending to prove that it was to affect the dower right of the bankrupt's wife. Whether that right shall be protected in Pennsylvania depends upon the local law of that State. It is submitted that it is better to carry out the intent of Congress and at the same time retain the common law principle of dower than, merely because of a technical similarity of words, to extend the exceptions which have long existed in the law of Pennsylvania and include the trustee in bankruptcy in that class of persons which is permitted to divest a wife of her traditional dower right.

H. I.

CARRIERS—DISCRIMINATION—As to whether or not the common law provided against discrimination by carriers, there is great diversity of opinion. It would seem that no such rule existed in England.[1] Although there is a decided conflict with respect to this question in the United States, the weight of authority upholds the view that all shippers similarly situated were entitled to equal rates.[2] Legislation in both countries has removed all room for doubt concerning the law to be applied today.[3]

Since today carriers must charge the same rate for substantially the same transportation service at the same time and under substantially similar circumstances, the question arises as to what recovery may be had by a shipper against whom a carrier has discriminated. A recent opinion of the Supreme Court of Minnesota is to the effect that damages are to be measured by the difference between the rate paid by the plaintiff and the lower rate enjoyed by

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S. C., Tenn., Va., and Wis.

[22] Congressional Record, 61st Congress, pp. 2552-4.

[23] *Supra*, n. 14.

[1] Great Western Ry. Co. v. Sutton, L. R. 4 H. L. 238 (1869); Baxendale v. Eastern Counties Ry. Co., 4 C. B. (N. S.) 63 (1858).

[2] Messenger v. P. R. R., 36 N. J. L. 407 (1873); Interstate Commerce Commission v. Baltimore & Ohio R. R. Co., 145 U. S. 276 (1891). But see *contra*, Johnson v. Pensacola Ry. Co., 16 Fla. 623 (1878), where it is said that the carrier's only duty was to allow reasonable rates.

[3] English Railways Clauses Consolidation Act, §90, 8 & 9 Vict., c. 20 (1845), and Interstate Commerce Act, §2. Almost all of the separate states have enacted similar provisions to apply to interstate commerce.